REMARKS

1. This supplemental amendment should be entered after entry of the amendment previously submitted on October 16, 2007. It is responsive to the advisory action mailed December 5, 2007.

2. In claim 35 as amended October 16, 2007, the second "of" in the phrase "said mutant of III of IV is Pfl defective but not also Ldl-defective" is indeed a "typing error" as surmised by the Examiner, "or" having been intended. This has now been corrected. It is perhaps unfortunate that the Examiner did not advise us whether, if this obvious[1] typing error were corrected, the 35 USC 112 rejections of amended claim 35 would have been withdrawn. In any event, that issue is now before the examiner.

3. The Examiner appears to have misunderstood a number of comments made in the October 16 paper.

3.1. With regard to the restriction requirement, the Examiner says "Applicants appear to argue that some typing error(s) in the strain characterizations and/or strain designation numbers have occurred in the previously presented claims". That is mistaken. The error was in the restriction requirement.

Specifically, group III was defined as corresponding to "doubly defective mutants", which would cover DN223, see page 28, line 11.

Claims 20-23 were included in group III, but they are not doubly defective mutants. Claim 20 requires the ability to grow anaerobically. Claim 21 specifically recites that the claimed mutant has the wild-type Pfl activity. Claim 23 is specific to DN224.

Claim 20 refers to claim 12, but it is not actually dependent, in the 112 para. 4 sense, on claim 12 because it does

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[1] See the statement on page 8, lines 2-4 of the October 16 amendment, "Consequently, we have amended (III) and (IV) to exclude mutants which are Ldl-defective".

not further limit 12. Claim 12 requires that the bacterium be Pfl defective and "not capable of growing under anaerobic conditions". Claim 20 is directed to a mutant of the bacterium of claim 12 which is capable of growing anaerobically. Claim 21 more specifically requires that it have "wild-type Pfl activity".

Hence group III should either be recharacterized as drawn to Ldh-defective mutants, or split into two groups, III-A (doubly defective mutants; no anaerobic growth) (claims 12-19, 28) and III-B (anaerobic growth but Ldh-defective mutants) (claims 20-23).

It does not appear that we initially presented a claim to the method corresponding to claims 20 and 21. We do so now, as claims 45-46, recognizing that these claims 45-46 are likely to be withdrawn under the doctrine of constructive election. Nonetheless, we need to present these claims here in order for them to be properly presented at a later time in a divisional application.

3.2. The other issue we raised was concerning claim 24 and DN225. Claim 24 read as follows:

> A mutant or variant according to claim 20 which is Pfl defective and has the wild-type Ldh activity.

Thus, it is a Pfl-defective, Ldh-positive mutant of the doubly defective mutant of claim 20. The PTO erroneously grouped claim 24 into group III which is for doubly defective mutants. It seems to us that since it is drawn to Pfl- Ldh$^+$ mutants, claim 24 should have been grouped with the elected claims. We cancelled claim 24 in reliance on its (improper) grouping into group III.

Our mutant DN225 fell within the scope of claim 24. Since the instant RCE reopens prosecution, we have presented a new claim specific to DN225, which we consider to be consonant with the prior election because DN225, like DN221 and DN227, is Pfl-,

Ldh^+.

The Examiner erroneously asserts that DN225 was never claimed during prosecution and never deposited. But it follows from the foregoing that DN225 was in fact generically claimed during prosecution, via claim 24. As to meeting the deposit requirement for DN225, we direct the Examiner's attention to page 30, lines 28-32.

New claim 47 parallels claim 11 but is directed to DN225. As previously explained, DN225 is properly grouped with DN221 and DN227 because it is Pfl-, Ldh^+, see P31, L17-19. DN225 is a mutant of DN223 (P30, L16-22) which in turn was derived by mutation of DN221 (P27, L5-12).

4. Claim 35 is directed to the already isolated strains (I) DN221 and (II) DN227, and the mutants (III) and (IV) of those strains.

It occurred to us that the PTO might prefer a claim which recited a <u>method</u> of producing new mutants by mutation of DN221 and DN227, see new claims 41-44. Claim 41 parallels 35; 42 parallels 36, and 43-44 are specific to DN221 and DN227 respectively (cp. claims 39 and 40).

While we consider claims 35 and 36 to be allowable, we would be willing to cancel those claims in favor of new claims 41-44 if that would result in allowance.

Respectfully submitted,

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